IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY MARTINEZ,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	**NO. 06-05278**
	:	
v.	**:**	
	:	
OFFICER MARK MARINO, et al.,	**:**	
Defendants.	**:**	

M E M O R A N D U M

STENGEL, J. **June 18, 2007**

This is a civil rights case arising from a police search. Defendants Joseph Koury and the City of Allentown moved to dismiss portions of the plaintiff's complaint on April 9, 2007. For the reasons discussed below, I will grant the motion.

I. BACKGROUND[1]

Plaintiff Gary Martinez is an adult who resides in Allentown, Pennsylvania. On December 2, 2004, at approximately 1:00 a.m, Martinez walked to a convenience store near his home to purchase snacks and a soda. He called his friends to ask them to give him a ride to his mother's house. His friends, Bernard Krokus and Elio Ramos, picked him up at the store and drove to Martinez's mother's house at 215 E. Lynnwood Street in Allentown.

Defendants Officer Mark Marino and Officer Joseph Koury, who were driving a marked Allentown Police paddy wagon, stopped the car Martinez was riding in as it

[1] The facts are taken from the complaint and are accepted as true for the purposes of this motion.

turned onto Jerome Street. Defendants Sergeant Ressler and Officer Jane Doe arrived on the scene separately in an Allentown Police patrol car.

Marino approached the car and stated that the occupants looked suspicious and accused them of dealing drugs. The police ordered Krokus and Ramos out of the car and searched it without finding drugs or any other unlawful items. The police ordered Martinez out of the car and told Krokus and Famos to get back into the car and wait. Marino accused Martinez of being a drug dealer and made Martinez empty his pockets and patted him down. The officers did not find any drugs or other illegal substances. The police did find a ten dollar bill and accused Martinez of having received the money in a drug sale. Martinez showed the officers his work schedule to try to show that he had a full-time job and was not a drug dealer.

Sergeant Ressler ordered Martinez into the paddy wagon with officers Marino and Koury. Marino ordered Martinez to remove all of his clothing while Koury held a side-handled baton in front of Martinez in a menacing manner. Once Martinez was completely naked, the police ordered him to bend over and spread his buttock cheeks and then to face them and lift up his scrotum. This search produced no drugs or unlawful substances.

The police ordered Martinez to put his clothes back on and continued to question him about why he was waiting at the convenience store and accused him of attempting to rob the store. Marino ordered Martinez to walk home and not to reenter his friend's car. No criminal charges were ever filed against Martinez.

On December 1, 2006, Martinez filed a complaint against Officer Marino, Officer Koury, Sergeant Ressler, Officer Doe, and the City of Allentown. Martinez alleges that the Allentown Police Department has a *de facto* policy of conducting unlawful strip searches; has deployed a paddy wagon specifically for this purpose; and deliberately fails to document these searches. The complaint[2] alleges: (1) deprivation of Martinez's federal constitutional rights under color of state law; (2) unlawful seizure in violation of the Fourth Amendment; (3) unlawful search in violation of the Fourth Amendment; (4) false imprisonment in violation of the Fourth Amendment; (5) supervisory liability; (6) failure to intervene by non-supervisory participants; (8) civil conspiracy; (9) municipal liability; (10) violation of Martinez's state constitutional right to be free from unreasonable searches and seizures; (11) false arrest and illegal imprisonment in violation of state law; (12) civil conspiracy in violation of state law; (14) intentional infliction of emotional distress in violation of state law; (15) invasion of privacy in violation of state law.

On April 9, 2007, defendants Koury and the City of Allentown filed this motion to dismiss. On April 24, 2007, the court dismissed defendants Marino and Ressler for lack of prosecution.

[2] Counts 1-8, 10-12, 14-15 are against all individual defendants. Count 9 is against the City of Allentown. There is no Count 13 in the complaint. An additional misnumbered count (the second count IV) requests a jury of twelve jurors.

II. STANDARD FOR A MOTION TO DISMISS

A. Rule 12(b)(6) Standard

The purpose of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is to test the legal sufficiency of a complaint. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). The court may grant a motion to dismiss only where "it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Carino v. Stefan, 376 F.3d 156, 159 (3d Cir. 2004) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The court must construe the complaint liberally, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff. Id. See also D.P. Enters. v. Bucks County Cmty. Coll., 725 F.2d 943, 944 (3d Cir. 1984). A plaintiff, however, must plead specific factual allegations. Neither "bald assertions" nor "vague and conclusory allegations" are accepted as true. See Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906 (3d Cir. 1997); Sterling v. Southeastern Pa. Transp. Auth., 897 F. Supp. 893 (E.D. Pa. 1995). In the context of anti-trust litigation, the Supreme Court recently emphasized that while a complaint "does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Bell Atl. Corp. v. Twombly, No. 05-1126, 2007 U.S. LEXIS 5901, at *21 (May 21, 2007).

B. Rule 12(b)(1) Standard

Since federal courts are courts of limited jurisdiction, a threshold question is whether a court has subject matter jurisdiction over the dispute. The standard for Rule 12(b)(1) challenges fall into two categories: facial and factual challenges. Martin v. Kline, 289 F. Supp.2d 597, 599-600 (M.D. Pa. 2003) (citing Mortensen v. First Fed. Sav. & Loan Ass'n., 549 F.2d 884, 891 (3d Cir. 1997)). A party brings a facial challenge, which is evaluated under the same standard as a Rule 12(b)(6) motion, by arguing that the allegations in the complaint are insufficient to show that the federal court has subject matter jurisdiction. Courtney v. Choplin, 195 F.Supp.2d 649, 650 (D.N.J. 2002). Factual challenges, which do not challenge the sufficiency of the pleadings but allege that the court lacks subject matter jurisdiction, are not evaluated under this standard. Id. Since defendants bring a facial challenge by attacking the sufficiency of plaintiff's complaint, the court will apply the Rule 12(b)(6) standard to the case.

III. DISCUSSION

A. First Amendment Claim

Martinez filed count I of his complaint under 42 U.S.C. § 1983 ("Section 1983") alleging that all individual defendants "deprived the Plaintiff of various federal Constitutional rights under color of law." Compl. ¶ 38. Section 1983[3] does not by itself

[3] Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper

confer substantive rights, but instead provides a remedy for redress when a constitutionally protected right has been violated under the color of state law. Oklahoma City v. Tuttle, 471 U.S. 808, 816 (1985); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997). In order to succeed on a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate: (1) the violation of a right secured by the Constitution, and (2) that the constitutional deprivation was committed by a person acting under the color of state law. West v. Atkins, 487 U.S. 42, 48 (1988).

In count I, Martinez does not identify which federal constitutional right he is attempting to vindicate under Section 1983.[4] In his response, Martinez clarifies that he raises First Amendment claims in this count and that defendants violated his right to freely associate with close friends by detaining him, strip searching him, and accusing him of dealing drugs and planning a robbery because of his association with the two friends who picked him up at the convenience store. These allegations of friendship do not support a viable First Amendment claim.

The First Amendment freedom to associate has two aspects: (1) to protect against government interference with an individual's autonomy to establish and maintain intimate

---

proceeding for redress . . . ." 42 U.S.C. § 1983.

[4] In paragraph 34 of his complaint, Martinez seeks relief for "general damages for violation of Plaintiff's Constitutional rights under the First, Fourth, Eighth, and Fourteenth Amendments to the United States Constitution." Compl. ¶ 34(e). Since the Eighth Amendment's prohibition of cruel and unusual punishment only applies to prisoners who have been convicted of a crime, and not arrestees or pre-trial detainees, Martinez has no claim under the Eighth Amendment since he was not convicted for this incident. See Mason v. Abington Twp. Police Dept., No. 01-1799, 2002 U.S. Dist LEXIS 17315, *15 (E.D. Pa. Sept. 13, 2002). Therefore, count I cannot be salvaged by reference to the Eighth Amendment.

or private relationships or (2) to associate for the purpose of participating in protected speech or religions activities. Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). Since Martinez is not claiming an association for speech or religious purposes, he can only claim protection of an intimate or private relationship. While the precise limits of what is a private or intimate relationship is unclear, established constitutionally protected relationships include marriage; bearing, rearing, and educating children; and living with relatives. Id. at 546 (1987). While not limiting protection to family relationships, the Court has stated that "the First Amendment protects those relationships...that presuppose 'deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life.'" Id. (quoting Roberts v. United States Jaycees, 468 U.S. 609, 619-620 (1984)). To determine whether an association should be protected, courts must consider "factors such as size, purpose, selectivity, and whether others are excluded from critical aspects of the relationship." Id. The Third Circuit has further explained that "[o]nly relationships 'distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship' are likely to implicate protection." Rode v. Dellarciprete, 845 F.2d 1195, 1204-1205 (3d Cir. 1988) (quoting Roberts, 468 U.S. at 620).

Applying these standards, Martinez's friendship with Ramos and Krokus is legally

insufficient to be protected by the First Amendment. Many courts have concluded that friendships, even good friendships, fall outside the scope of the First Amendment and Martinez has pled no specific facts to compel a different result in this case. See Rode, 845 F.2d at 1205 (finding that plaintiff's relationship with her co-employee and brother-in-law who was her "good friend" is insufficient for First Amendment protection); McCusker v. City of Atlantic City, 959 F. Supp. 669, 672 (D.N.J. 1996) (being fellow police officers and "professional friends" is not an association protected by the First Amendment); Lutz v. York, 692 F. Supp. 457, 459 (M.D. Pa. 1988) (concluding that plaintiff's First Amendment challenge to an ordinance that prohibited cruising failed because "[a] random meeting with other cruisers, even those who could be considered friends, is not the type of association protected by the constitution.").

B. Request for Injunctive Relief

In his prayer for relief, Martinez requests injunctive relief. As noted in Section II.B *supra*, defendants mount a facial challenge to this request by arguing that Martinez has not pled any facts to suggest the threat of future injury and therefore Martinez lacks standing to request injunctive relief. Martinez responds that defendants sought him out, based on his appearance, as part of a continuous effort to deprive citizens of their rights and therefore, Martinez fears a future incident.

The Third Circuit has explained that a plaintiff seeking prospective injunctive relief must allege a real and immediate threat of future injury:

> in order to invoke the powers of a federal court, the plaintiff must show an injury to himself that is likely to be redressed by a favorable decision. Absent such a showing exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation. Because the plaintiff must establish that a favorable decision will be likely to redress his injury, the form of relief sought is often critical in determining whether the plaintiff has standing. Thus, as numerous Supreme Court decisions illustrate, a given plaintiff may have standing to sue for damages yet lack standing to seek injunctive relief. While a § 1983 plaintiff's allegation that he has suffered from unconstitutional practices may be sufficient to establish standing to sue for damages, past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief. In order to obtain standing for prospective relief, the plaintiff must establish a real and immediate threat that he would again be the victim of the allegedly unconstitutional practice.

Brown v. Fauver, 819 F.2d 395, 400 (3d Cir. 1987) (citations omitted). Under these requirements, defendants argue that Martinez's claim for injunctive relief fails because while Martinez alleges that he was subjected to an unconstitutional search on one occasion, his complaint lacks allegations that there is a real and immediate threat that he will be subjected to unlawful police tactics in the future. In the two and a half years after the incident, Martinez has not alleged that he has suffered a similar injury.

Martinez fails to satisfy the pleading requirements to show he may be entitled to injunctive relief. The Supreme Court has suggested that a plaintiff, who alleged he had been choked by police, might be able to seek injunctive relief if he could make "the incredible assertion either (1) that all police officers in Los Angeles always choke any citizen with whom they happen to have an encounter, whether for the purpose of arrest, issuing a citation, or for questioning, or (2) that the City ordered or authorized police officers to act in such manner." City of Los Angeles v. Lyons, 461 U.S. 95, 105 (1983).

The plaintiff in Lyons failed to meet this heightened standard and Martinez does as well. In Count IX of his complaint, Martinez brings a Section 1983 Monell claim against the City of Allentown alleging that the city inadequately handles citizen complaints of police misconduct and fails to discourage constitutional violations by the police. However, this does not meet the requirements the Supreme Court set forth in Lyons because Martinez has not alleged that all police officers always conduct illegal searches (and in fact, the police did not search Martinez's friends) or that the City of Allentown authorizes police officers to conduct illegal searches. Therefore, I will dismiss Martinez's request for injunctive relief.

C. State Constitutional Claim

Martinez brings Count X of his complaint against all individual defendants for state constitutional violations under Article I, Section Eight[5] of the Commonwealth of Pennsylvania's Constitution. Defendants argue that this claim must be dismissed because there is no claim for monetary damages for violating the state constitution.

When considering whether a plaintiff had the right to receive money damages for an alleged use of excessive force by police officers who apprehended him for driving a stolen car, the Pennsylvania Commonwealth Court refused to create a new cause of action for monetary damages for an alleged unreasonable seizure in violation of Article I, Section 8 of the Pennsylvania Constitution. Jones v. City of Philadelphia, 890 A.2d 1188,

[5] "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures . . . ." PA. CONST. art. 1, § 8.

1216 (Pa. Commw. Ct. 2006), appeal den. 909 A.2d 1291 (Pa. 2006). Declaratory and injunctive remedies, however, are still available under the state constitution. Id. at 1216. Federal courts have followed the Jones decision and treated it as authoritative.[6]

After an extensive analysis, the Jones court concluded that:

> the judicial creation of a new cause of action for monetary damages for the City's alleged violation of Article I, Section 8 of the Pennsylvania Constitution, is not required in this case. We do not minimize the trial court's concerns, which we share, regarding the importance of protecting the constitutional rights of Pennsylvania citizens that are specifically promised to each citizen under the Pennsylvania Constitution. We appreciate the difficulty in balancing the constitutional protections that are essential to our freedom. Under the facts in this case, however, there is no evidence that the protection against the use of excessive force in Article I, Section 8, is broader than the Fourth Amendment. Because the same test would be applied here, to protect the same interest, under both Federal and State Constitutions, the protections are coextensive and Jones' right to be free from governmental use of excessive force is protected by the Federal Constitution as it would be under the Pennsylvania Constitution. Importantly, unlike in Bivens, there is no state statute which generally provides for a right to sue for this violation. There are many factors which counsel hesitation against the courts creating a new monetary remedy, where a remedy already exists, without benefit of legislative action. Consequently, we hold that, in this case, there is no separate cause of action for monetary damages for the use of excessive force in violation of Article I, Section 8 of the Pennsylvania Constitution.

Id. at 1216. Here, like in Jones, the plaintiff has viable Fourth Amendment claims so there is no need for a separate action for monetary damages under the Pennsylvania constitution. While Martinez is permitted to seek injunctive relief under the state

[6] See K.S. v. Sch. Dist. of Phila., No. 05-4916, 2007 U.S. Dist. LEXIS 23557, at *25 (E.D. Pa. Mar. 28, 2007); Mazzeo v. Mittman, No. 05-692, 2007 U.S. Dist. LEXIS 17450, at *8-9 (E.D. Pa. Mar. 8, 2007); Small v. City of Philadelphia, No. 05-5291, 2007 U.S. Dist. LEXIS 14323, at *36 (E.D. Pa. Mar. 1, 2007); Morales v. Taveras, No. 05-4032, 2007 U.S. Dist. LEXIS 4081, *56 (E.D. Pa. Jan. 18, 2007); Rauso v. Zimmerman, No. 97-1841, 2006 U.S. Dist. LEXIS 90343, at *26 n. 23 (M.D. Pa. Dec. 14, 2006); Jones v. Middletown Twp., No. 05-3719, 2006 U.S. Dist. LEXIS 44723, at *12 n.8 (E.D. Pa. June 24, 2006); Klump v. Nazareth Area Sch. Dist., 425 F. Supp. 2d 622, 642 (E.D. Pa. 2006). No reported decisions distinguish Jones or refuse to follow the decision.

constitution, Martinez only based his claim for injunctive relief on Section 1983. Compl. p. 24. Therefore, I will dismiss Count X in its entirety.

IV. CONCLUSION

For the reasons discussed above, I will grant defendants' motion in its entirety by dismissing Counts I and X of plaintiff's complaint and finding that plaintiff does not have standing to sue for injunctive relief.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARY MARTINEZ,	**:**	**CIVIL ACTION**
Plaintiff,	**:**	**NO. 06-05278**
	:	
v.	**:**	
	:	
OFFICER MARK MARINO, et al.,	**:**	
Defendants.	**:**	

ORDER

AND NOW, this 18th day of June, 2007, upon consideration of defendants' motion to dismiss (Document No. 4) and the responses thereto, it is hereby **ORDERED** that defendants' motion is **GRANTED**. Counts I and X of plaintiff's complaint are dismissed. Plaintiff's request for injunctive relief shall be dismissed due to plaintiff's lack of standing.

BY THE COURT:

/s/ Lawrence F. Stengel
LAWRENCE F. STENGEL, J.